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Supreme Court of the United States.

BRIEF FOR APPELLANTS.

JULIUS A. GOETZ,

JOHN F. BYERS,

17045

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

SAMUEL WRIGHT and ESDRAS B. TRUBEY, substituted for J. C. IVERSON, *Plaintiffs,* **vs.** **THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY OF ST. PAUL, MINNESOTA, formerly The Bankers Life Association of Minnesota, and C. H. BIGELOW, JOHN B. SANBORN, MAURICE AUERBACH, CRAWFORD LIVINGSTON, KENNETH CLARK, ALBERT H. LINDEKE and J. F. R. FOSS, Trustees of the Minnesota Mutual Life Insurance Company of St. Paul, Minnesota, formerly the Bankers Life Association of Minnesota.** *Defendants.*	Appeal from the Circuit Court of the United States, for the District of Minnesota.

STATEMENT OF CASE.

On the 6th day of August, 1880, there was organized under the laws of the State of Minnesota, an association under the name of "The Bankers' Association," of Minnesota, for the purpose of securing employment for its members and pecuniary assistance to the families of its deceased members. (Rec., 526; Pr. Rec., 289.)

By amendment to the articles of association, its name was changed, in 1884, to "The Bankers' Life Association of Minnesota," and the employment feature was eliminated.

In 1892, the articles of the corporation were again amended. In these articles the object of the Association is stated to be (see Exh. C., Defts. Answer, Rec., 549-560; Pr. Rec., 301-306):

> "Article II. The general purpose of this corporation shall be to secure benevolent and fraternal co-operation between its members, and to the families of its deceased members and other designated beneficiaries pecuniary assistance."

The general plan for securing those objects is contained in the following articles of said Exhibit C:

Article III provides:

> "The general plan of its operation shall be to assess and collect from its members (so long as they continue such) and thereupon pay over to the families of its deceased members, or other designated beneficiaries, stipulated sums of money, to be secured to them by sufficient pledges of money which shall be kept invested meanwhile in United States Registered Bonds."

Article IV further provided:

> "Any male person not less than eighteen nor over fifty-five years of age (counting to his nearest birthday), approved by the medical director of this company, may be admitted to one membership therein upon his application therefor, and upon his depositing with, or to the credit of this company the following sums of money: First, as many dollars as he is years of age, (counting to his nearest birthday), as his deposit in the 'Guaranty Trust Fund' of the Association, which fund shall be a pledge to secure payments to be made by this Association for death of members, and shall belong to this Association. Second, a membership fee equal to half his guaranty deposit. Third, his proportion of the annual expense assessment for the company's current fiscal year."
>
> "Article V. An applicant may be admitted to as many as three memberships in this company, but in every such case, his payments shall be proportionately increased."

Article VI provided as follows:

"Each member of this corporation shall pay thereto, on the last secular day of September, in each year, an assessment equal to fifteen per cent. on his contribution to the 'Guaranty Trust Fund,' to meet the operating expenses, and to be known as his 'Annual Dues'; and upon the death of any member each surviving member shall also pay to said corporation, on demand, an assessment equal to two per cent. on his contribution to said 'Guaranty Trust Fund,' and out of the sum obtained from said last named assessment, which shall be known as the 'Mortuary Assessment,' there shall be paid to such beneficiary as is designated in the membership certificate, the sum of money in the said certificate named.

All assessments upon members of this corporation shall be apportioned among all members thereof pro rata, that is to say, in proportion to the amount that each member has paid into said Guaranty Trust Fund. All assessments due or to be paid to this corporation shall be paid to such officers or persons and at such places as the said Board of Trustees shall name and specify. In order to secure prompt payment of all losses occasioned by death of its members and to avoid unreasonable expense incident to the making and collection of assessments and to promote the convenience of all parties, said assessments need not be made on account of such death loss separately, but may be made at stated intervals as said Board of Trustees may direct, to provide for all or any death losses of said corporation that have taken place prior to the making of any such assessment, or assessments. Any assessment for the purpose of paying any death losses shall uniformally be two per cent. of each surviving member's contribution to said 'Guaranty Trust Fund' for each such death loss, and in case any such assessment shall produce a gross amount in excess of the amount needed to pay such death losses, then such excess may be used to discharge death losses subsequently occurring.

Section VIII. Any person, having once been a member of this company, may be readmitted, in the discre-

tion of the officers of this Association, upon his furnishing to them satisfactory evidence that he is in good health, and upon his paying to said Association all assessments, dues and other sums of money, which he would have been called upon to pay to this Association had he continued to be a member thereof."

Article X provided as follows:

"All amounts pledged to this company to secure payments of assessments occasioned by death of its members, shall be used only for that purpose, and meanwhile the same shall be and remain invested in United States Registered Bonds, and shall constitute and be known as 'The Guaranty Trust Fund.' Such bonds shall be made payable to this company and shall be transferrable or convertible only upon resolution of its Board of Trustees and such Board shall have the exclusive charge and control thereof.

All interest realized from such bonds shall meanwhile be used to defray the Company's operating expenses.

This article shall never be amended, or in any way at all changed, without the consent of every member of this Company, to be given in writing signed by him, and filed with the Company's Secretary, and reciting in full the proposed amendment or change."

Article XI provides, among other things, "that all losses occasioned by death of members shall be collected by this company from its members," and for a method of assessment for losses and collecting assessments, and also "in case of death or default on the part of any member to pay any of his assessments, the Association may use his deposit in the Guaranty Fund to pay death losses in such manner as it shall deem best and such use shall not work a payment of any assessment against the defaulting member."

Article XII provided that "upon the death of each member of this company, his family or designated beneficiary shall receive therefrom, a sum equal to two per cent. of the then subsisting "Guaranty Trust Fund" of this company, not

exceeding, however, two thousand dollars upon each full membership and one thousand dollars upon each half membership held by the deceased and in force at the time of his death and not exceeding six thousand dollars in any case."

Article XIV provided for the election of trustees and defined their powers and duties, and stated, among other things, their power.

> "Fifth, to amend these articles (except as therein otherwise provided) and to generally direct, manage, control the business and concerns of this company."

Article X, above set forth, was contained in the original Articles of Association and in all the amendments thereto in exactly the same form. Under these conditions, appellant Wright became a member of the Association on December 10, 1892, and appellant Trubey on March 13, 1893. Their membership certificates are substantially the same as Exhibit "B" of bill of complaint. (Rec., 50; Pr. Rec., 27.)

On December 24, 1898, the trustees of The Bankers' Life Association met and declared that they "intend to and do hereby amend the articles of incorporation of, and re-incorporate said The Bankers' Life Association of Minnesota." This amendment was made by striking out all of the articles of Exhibit C, except article X, and substituting others designed to allow the issuance of policies hereafter mentioned, and to divide the membeship of the company into classes having "special benefits, privileges, promises and requirements not prejudicial to other members." (Rec., 564 to 569; Pr. Rec., 308 to 311.) A code of by-laws was adopted at the same time, into which was injected, as article V thereof, the greater part of the former articles of incorporation, excepting, of course, article X. (Rec., 583-592; Pr. Rec., 318-322.)

Afterwards the officers of the Association began to issue what was called a "Guaranteed Option Policy," a copy of which is contained in the record (p. 57, *et seq.;* Pr. Rec., 31-37). This policy was in form like an "old line" or "legal reserve" policy, and contained provisions for the payment of a fixed premium, and, upon death, a definite sum of money, for loans, surrender values, extended insurance, paid up policy, the maintenance of a legal reserve, and for dividends. It was differentiated from legal reserve policies by a provision, that if by reason of unexpected losses and *expenses,* the amount paid in under the policy should be less than the required reserve, the deficiency might be charged as an indebtedness upon the policy, bearing interest at four per cent. until paid off by dividends or otherwise. Many, if not all, of these policies contained a further provision that "no personal liability to make any involuntary cash payment whatever, is incurred by holding a policy in this company. Any member is free at any time to cancel any past, present or future indebtedness to this company by surrendering this policy at the home office for cancellation." (Rec., 58; Pr. Rec., 31.)

Early in the year 1899 the Association ceased to solicit or secure any members on the original, or mortuary assessment plan, and confined its efforts to inducing members to change their membership certificates for a "Guaranteed Option Policy," and almost futile efforts to secure new policy holders. No new members on the mortuary assessment plan have been added to the Association since early in the year 1899. One of the inducements offered to members for making such change, was that a member should receive, as a credit on the premium to be paid for his new policy, a sum equal to his deposit in the "Guaranty Trust Fund,"

with interest. The method of making this credit is fully set forth on pages 217-218 of the record. (Pr. Rec., 120-121.)

On December 31, 1898, the Association had 12,090 full memberships, all on the mortuary assessment plan, representing $24,180,000 insurance. (Pr. Rec., 126; Rec., 228.) On July 31, 1901, there were still 2,188 memberships of that class in force, representing $4,376,000 of insurance (Rec., 232; Pr. Rec., 129), while about 3,800 persons holding nearly 5,500 memberships, representing about $11,000,000 of insurance, had been induced to exchange their certificates for "Guaranteed Option Policies." On December 31, 1901, the mortuary assessment membership had been further reduced to 1,417. (Rec., 233, 742-750; Pr. Rec., 130, 403-408.)

Article X, quoted above, at all times provided that the interest on the "Guaranty Trust Fund" should "meanwhile" be used for the expenses of management. In dealing with its funds the company created what was known as an "operating fund," out of which was paid the general expenses of management, and in this fund was placed interest from the "Guaranty Trust Fund," and all the expense assessments levied by the Association.

For many of the years of its existence there was a surplus in this fund, the interest and assessments above mentioned being in excess of the charges against it. In 1887 a special fund, known as a "contingent fund," was created, into which was carried the surplus from the "operating fund." This "contingent fund" was intended to be used to meet any contingent or extraordinary expenses of the Association.

When a member had been induced to exchange his mortuary assessment certificate for a "Guaranteed Option Policy,"

the credit agreed to be allowed him, equivalent, as above stated, to his contribution to the "Guaranty Trust Fund" and interest, was charged to this "contingent fund," and directly or indirectly carried to the "premium fund," so called, which fund included the reserve provided for in the "Guaranteed Option Policy," and also required by the statutes of Minnesota, referring to legal reserve companies. From December 31, 1898, to July 31, 1901, about $236,000 were so taken from the "contingent fund" and transferred to the "premium fund." (Rec., 221-223; Pr. Rec., 121-122.)

Appellant Wright refused to pay any more assessments after January, 1900, and demanded the cancellation of his "policy" and the return of his money. The defendant company treated him as having forfeited his membership, but refused to return any money. (Rec., 382; Pr. Rec., 215.)

On the 5th day of August, 1901, an annual meeting of the Association was held. At this meeting a resolution was in form adopted, as set forth in Exhibit E of defendant's answer (Rec., 595-603; Trans., 324-328), by which it was sought to reorganize the Association under the name of the Minnesota Mutual Life Insurance Company, as a legal reserve life insurance company, under chapter 175, Laws of Minnesota for 1895, as amended by Chap. 143 Gen'l Laws of Minnesota for 1901. The requirements of that statute were formally complied with, and all filings and executions of the different papers therein required were made and completed on the afternoon of the same day. (Rec., 678; Pr. Rec., 366.) In these articles of reorganization nothing is left of the original, or previously mentioned articles, except article X.

Article IX, of which reorganization articles states, that, "Article X of these articles, relates solely to a 'Guar-

anty Trust Fund,' heretofore created by the deposits of members who became such under the assessment plan," and is made to show the reason for the insertion of article X. (Rec., 595; Pr. Rec., 324.)

A notice of this meeting had been given in the usual form, but that notice contained no statement of any proposition to change any of the articles of incorporation. The body of the notice was as follows:

"NOTICE.

The annual meeting of the members of The Bankers Life Association of Minnesota will be held at the home office of the company in the St. Paul Fire and Marine Building in the City of St. Paul, State of Minnesota, on the fifth (5th) day of August, 1901, at ten o'clock in the forenoon, for the transaction of such business as may properly come before it. The By-Laws provide that members may vote in person or by proxy duly appointed in writing: but proxies must be registered with the Secretary at least five days before the meeting.

No individual not a member can be appointed as a proxy of any member.

Dated St. Paul, July 5th, 1901.

DOUGLAS PUTNAM,
Secretary."

(Rec., 320; Pr. Rec., 184.)

The vote upon the resolution showed that out of $15,501,-500 of insurance claimed to be in force at that date, $9,265,-000 was represented in person or by proxy, but of this large amount only $156,000 was represented in person, and upon the final vote on the articles of incorporation, votes were cast by the "board of trustees," as proxy, for nearly $9,000,-000 of this amount. (Rec., 670, 677, 678; Pr. Rec., 362.)

Chapter 175, Laws of Minnesota for 1895, is a codification of the General Insurance Laws of the state.

Section 2 of that act recited:

> "All insurance companies hereafter incorporated, or formed by authority of any general or special law of this state except * * * and corporations engaged in the transaction of life and casualty insurance upon the assessment plan, under the laws of this state, *may exercise the powers* and shall be subject to the duties and liabilities provided by this act.
>
> And the legislature may, for any cause, it being sufficient, annul or dissolve any such corporation, or revoke its charter, and may amend or repeal the laws affecting the powers and obligations of such corporations."

Section 3 provides that this act shall not interfere with corporations engaged in the transaction of life and casualty insurance upon the assessment plan under the laws of this state.

Section 63 of the same act, prior to its amendment, was as follows:

> "All corporations, associations, partnerships or individuals doing business in this state under any charter, compact, agreement, or statute of this, or any other state, except as provided in section three, involving the payment of money, or other things of value, to families or representatives of policy and certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance guaranty, contract, or pledge for the payment of endowments, or annuities, shall be deemed to be life insurance companies, and shall not make any such insurance guaranty, contract, or pledge in this state, or to, or with, any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor the performance of which is contingent upon the payment of assessments made upon survivors."

This general law was amended in several particulars by chapter 143, General Laws of Minnesota for 1901.

Section 21 was amended so as to read as follows:

"The general provisions of law relative to the powers, duties, and liabilities of corporations or their agents, shall apply to all incorporated insurance companies as far as the provisions are pertinent and not in conflict with the provisions of law relative to such companies or with their charters.

Any insurance company, not excepting companies transacting business on the mortuary assessment and stipulated premium plan, or either thereof, may qualify and be governed by this chapter, anything in its special charter to the contrary notwithstanding; provided, that nothing herein contained shall impair, or operate to impair, the obligation of any contract, and provided further, that after such qualification, the company qualifying shall be governed solely by this act; and, provided further, that nothing in this act contained shall apply to any town insurance, mortuary assessment, or stipulated premium company, unless and until it shall accept and qualify under the provisions hereof; and, provided further, that notice of the acceptance of said act be filed with the insurance commissioner."

Section 28, so far as it relates to the attempted reorganization of this company, was amended as follows:

"First—To organize a company the proposed incorporators must be residents of this state, and not less than ten in number, and shall subscribe and duly acknowledge before some officer authorized to take acknowledgments to deeds, articles of association, setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation authorized to transact business in this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact and on what business plan or principle; the place within this state of its location, or home office; and, if on the stock plan, the amount of its capital stock; also any additional suitable and lawful declarations or

matters the said incorporators may see fit to embody therein."

The procedure for *organizing or* reorganizing such incorporation shall be as follows:

"Second—Any domestic insurance company, not excepting those transacting life or casualty insurance business on the mortuary assessment plan and stipulated premium plan, or on either thereof, may at any time qualify and reincorporate under the provisions of this act, either as a stock company, if a stock company at the time of reincorporation, or as a mutual company, if a mutual company at the time of reincorporation, retaining or adopting any name consistent herewith and approved by the insurance commissioner.

To accomplish such reincorporation a resolution shall be adopted by a majority vote of all the votes cast by the stockholders of a stock company, or by a two-thirds vote of all the votes cast by the members of any other company, at any special meeting called for that purpose, of the holding of which not less that thirty days' written or printed notice, specifying the time and place, shall have been given, or by such majority vote or two-thirds vote as the case may be, at any regular meeting of such stockholders or members, authorizing and declaring such reincorporation, and setting forth the future corporate name of such company, which must not so closely resemble the name of an existing corporation authorized to transact business in this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact, and on what business plan or principle; the place within this state of its location, or home office; and if on the stock plan, the amount of its capital stock; also any additional suitable and lawful declarations or matters the said voters may see fit to incorporate therein."

It is conceded that the purely formal requirements directed by the remainder of this section were duly complied with.

Section 63 of the Act of 1895 remained unchanged, except that the following proviso was added:

> "That nothing in this section contained shall apply to any contract, policy, or certificate of membership issued by any corporation or company while transacting the business of life insurance on the mortuary assessment plan and stipulated premium plan, or either thereof, prior to receiving authority to transact life insurance business under the provisions of this act, but such contracts, policies and certificates shall be fulfilled and carried out according to the terms and conditions of each thereof, subject to change by the parties thereto."

Upon these, and many other facts, a bill of complaint was filed by J. C. Iverson, and apepllant Wright, in the Circuit Court, above named, on the 10th day of October, 1901, against the parties named in the title to this action. This bill stated that the officers and trustees of the Association had fraudulently misused its funds; that the Association was insolvent; that the issue of the so-called "Guaranteed Option Policy" and the solicitation of members upon the mortuary assessment plan, to exchange their membership certificates for such policies, was a fraudulent invasion of the contract and charter rights of the members, and constituted an abandonment of the business for which the company was organized; that the attempted reorganization of August 5, 1901, was a breach of the contract rights of the appellants; that it was fraudulently conceived and carried out, did not comply with the law, and even if it did, the law authorizing such incorporation was and is unconstitutional and void, and praying that the Association be wound up and a receiver be appointed to properly distribute its assets among the parties entitled thereto. (Rec., 1, *et seq.;* Pr. Rec., 1, *et seq.*)

Defendants duly answered, denying any fraudulent acts or purposes on their part, and alleging that the acts of the trustees complained of were necessary and proper, owing to the condition of the Association and of the insurance business in general, and were, in fact, absolutely necessary to continue the life of the Association.

They admitted that they had made no efforts since January, 1899, to secure members on the "old morturary assessment plan," but that up to August 5, 1901, had solicited and secured members on the "Guaranteed Option Policy plan, and that all members of the Association had been advised of the wisdom of exchanging their mortuary assessment certificates for "Guaranteed Option Policies," and that many had made such exchange.

Paragraph XIV of the answer alleges laches on part of complainants, alleging that they knew of the amendments of the by-laws and the issuance of the "Guaranty Option Policy," and that many million dollars' worth of insurance had been issued and exchanged, and that they had taken no proper steps to prevent the same.

Prior to the trial of the action, the complainant Iverson withdrew from the case, and, upon motion, appellant Trubey was substituted in his place, and the action continued as above. (Rec., 117; Pr. Rec., 61.)

In due time the case was heard before the Hon. C. F. Amidon, who, on August 12, 1902, rendered a decision (Rec., 1397-1398; Pr. Rec., 743-748) to the effect that the charges of fraud and insolvency were wholly unsupported by the evidence; that appellant Wright had no standing in court, because he had elected to cancel his contract and demand back his money. Then, reaching the heart of the case, the court asks two questions:

First. Has the company departed from the fundamental law of its being in a manner forbidden either expressly, or by implication, by its articles of association?

Second. Has the company done anything to impair the vested rights of the holders of its certificates of insurance?"

And then proceeds at some length to answer both questions in the negative.

In the decision is made the radical assertion that the change in the business of the Association, outlined above, "relates solely to the manner of doing business; it is in no way a change of the essential character of the business upon which the corporation entered at the beginning."

Decree was entered upon the decision, dismissing the action. (Rec., 1399; Pr. Rec., 749.)

Complainants, regarding the questions of fraud and insolvency as of secondary importance, have appealed from the decree so entered, and have assigned the following errors upon which they intend to rely upon this appeal.

Assignment of Errors.

1st. The court below erred in not decreeing the statute of the State of Minnesota, viz., chapter 175 of the General Laws of the State of Minnesota for the year 1895, as amended by chapter 143 of the General Laws of the State of Minnesota for the year 1901, under which defendant Association reincorporated, and changed itself from a mortuary assessment association to a legal reserve life insurance company, unconstitutional and void.

2d. The court below erred in not decreeing the change made by the trustees of defendant Association, on January

1, 1899, and thereafter, by issuing the "Guaranteed Option Policy," transferring the members to a separate and distinct class, and ceasing to solicit members on the mortuary assessment plan, as being a departure from the original purpose of the Association, and as an impairment of the obligations of the contracts and rights of appellants and as being *ultra vires* and void.

3d. The court below erred in not decreeing the acts of the trustees of defendant Association, and persons to whom such "Guaranteed Option" Policies were issued, in changing, on August 5, 1901, and thereafter, the character and purpose of defendant Association from a mortuary assessment association to a legal reserve life insurance company, as being an impairment of the obligation of the contracts and rights of appellants, and as being a radical departure from the original purpose of the organization and *ultra vires* and void.

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ARGUMENT.

The Contract.

The contract made by each member of the Bankers' Life Association prior to the amendment of its articles of December 31, 1898, was uniform and mutual. No classes, or class distinctions were provided for or contemplated either in the charter, or by-laws of the Association. Each member in consideration of the pledges of his fellow-members, pledged himself that during his life he would pay, upon the death of any fellow-member, a fixed sum of money, and every other member was in like manner pledged to him. In earnest of the pledge, each member deposited in the treasury a certain sum of money, as security for the keeping of his promise. In case of his failure to pay upon any death, the amount agreed, the fund in which his pledge was placed could be drawn upon to make good his default, and that fund could be drawn upon for no other purpose. It was, of course, as in all insurance contracts, a necessary part thereof that sufficient membership should be secured, and that membership so distributed in respect to locality, as to secure practical uniformity in the average death rate of the Association. This, indeed, is the basis of all insurance. Under this contract, each member had a vital and pecuniary interest in the life and continuing membership of every other member. The loss of a member by death called for an immediate payment. The default of a member entailed a loss to all other members of the means by which their beneficiaries should be compensated for their deaths. There was a sum pledged to secure the members against default.

But to take the case of a man at forty years of age, his contribution of $40 under this plan, would pay his mortuary assessment two or three years at most, after his default, while if he paid for his lifetime, as he had agreed to do, his payments might reasonably be expected to continue for ten times that period. Taking away a member by causing him to cease payment of his assessment, was only a little less injurious to his fellow-members, than to take him away by death. The strength of the Association lay in its membership.

While, theoretically, the member was bound to the Association for life, and upon default could be compelled to pay his assessments by legal process, practically it would not be profitable to enforce that part of the contract. It was the less expensive course, to secure a new member to take the place of the defaulter, and accordingly liberal allowance for expense of management was made, and a board of trustees was created to operate the machinery to carry the contract into effect. This board was not the Association, although it seems that some of its members had a delusion to that effect. The board was the hand by which the Association was to work out its objects. The duties of the board were simply to secure an adequate membership, to make and collect assessments on proper occasions, to pay lossess occasioned by death, and to properly keep the funds entrusted to them; and failure on their part to faithfully perform these duties was a breach of the trust imposed on them. It was a necessary part of their duties to secure new members to take the place of those lost by death or default.

The Supreme Court of Minnesota, in considering the case of an assessment insurance association, where the trustees had attempted to put the older members into a class

by themselves (*Ebert* v. *Mut. Res. Fund. Life,* 81 Minn., 116-126), said:

> "Such a proceeding was in violation of the contract. The old members joined the association on the theory that it was to be a living institution—as old members dropped out or died, and are paid off, new members come in, younger in years; thus adding strength and keeping up the vitality of the association."

It would seem that this view of the contract should be binding on a Minnesota corporation.

Whatever may be said of the wisdom of the plan of this contract, there can be no criticism of its fairness. No fairer one was ever made. Its terms were clear and understood by every member, and even by the Trustees. The class of so-called insurance given was what the contracting parties desired. If other and more expensive plans were better than this, this was still the plan adopted as the one the members could afford to try to carry out, and the contract that was made in pursuance of that plan.

This contract might be broken in many ways, either by the members, or by the Association through its trustees, or by a majority of its members. Of these many possible violations of the contract, the assignments of error cover only the following:

1st. Making a change of the business of the Association from the one for which it was organized to another and different business.

2d. Adopting such a course of action as to prevent the securing of an adequate membership in the Association under the plan upon which the Association was organized.

3d. In adopting such a course of action as to necessarily reduce the membership secured on the plan under which the Association was organized.

4th. In diverting the funds of the Association secured under the operation of the plan of the Association, to another and inconsistent plan.

5th. By amending that article of the Association by indirect means, which it is provided could not be amended except by the consent in writing of every member.

6th. By abandoning the business for which the Association was organized.

The primary legal principal involved, is that no corporation has the right to change the business for which it was created so as to engage in another and different business without the consent of every member. We had supposed this to be elementary law.

In *Livingston* v. *Lynch*, 4 Johns., Ch. 573, which is perhaps the first case upon the point arising in this country, Chancelor Kent decided, following some earlier English cases, that the charter of a corporation was a contract between the corporation and its members and that neither the directors nor the majority of the members could bind a minority without their assent in any matter not expressly or impliedly authorized by the charter.

A later decision by Lord Eldon in *Baluseh* v. *Irving*, 2 Coop. t. Cott., 358, seems to be treated as a leading case in England on this point, and is to the same effect.

The English doctrine is clearly stated in *Pickering* v. *Stevenson*, L. R., 14 Eq. Cas., 322, as follows:

> "The principle of jurisprudence which I am asked here to apply, is that the governing body of a corporation cannot use the funds of the community for any purpose other than those for which they were contributed. By the governing body, I do not, of course mean exclusively the directors or a general council, but the ultimate authority within the society itself,

> which would ordinarily be a majority at a general meeting. According to the principle in question, the special powers given either to the directors, or a majority, by statute, or other documents of the Association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purpose of the original bond of the Association. This is not a mere canon of English municipal law, but a great and broad principle which must be taken in the absence of proof to the contrary, as a part of any given system of jurisprudence."

The same doctrine is well summarized in *Kean* v. *Johnson,* 9 N. J. Eq., 401-407.

> "They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract they each agree to abide by, but there their mutual contract ends, and no majority however large, has the right to divert one cent of the joint capital to any purpose not consistent with and growing out of this original fundamental joint intention."

We can find no case in which the doctrine of these and the cases following them, has been overruled, or even criticized, except by the solitary case discovered by the defendants in that mine of curious legal precedents, the records of the so-called Supreme Court of New York, where it is said that one can find decisions on every possible side of every possible case, that of *Grove* v. *Erie,* etc., 53 N. Y. Supp., 628, where the court condemns the rule because of its inconvenience, saying, "consent of every member never could have been obtained in such an army of stockholders."

The inconvenience to which the court calls attention in that case is one of the means of protection to which every member is entitled upon entering a corporation. It forms a part of his contract.

Very many of the cases in which the same legal principle is laid down, as in the case of *Byrne* v. *Schuyler,* a Connecticut case reported in 28 L. R. A., 304, have arisen in cases of "attempted sale of the entire assets of the corporation, or of consolidation of the corporation with other corporations, and in all the cases the reason for the decision is the same, and that is, that the change, sale, or consolidation was of such a nature as to change the plan, or purpose of the organization in such a way as to constitute a breach of the contract under which the complainant, or complainants became members of the Association.

It cannot be necessary to cite all the cases bearing on this point. Their number is legion. The most important of them are cited and approved in the case of *Byrne* v. *Schuyler, &c.,* 65 Conn., 336, reported in 28 L. R. A., 304, pp. 307-309, is given a very full statement of our views of the law on this point.

The Change Resulting From the Attempted Re-incorporation.

If we have stated the law correctly, the next question to be considered is whether the so-called re-organization of the Banker's Life Association on Aug. 5, 1901, is a change in the business, plan, or object of that association, to a plan, or business, inconsistent with the one under which the complainants became members of the Association.

As has been seen, Chap. 175, Laws of Minn., for 1895, is a codification of the laws of the state, relating to all forms of insurance companies, and insurance, except what are locally known as, "Town Insurance Companies," and companies doing a life insurance business on the assessment plan, so, that by the statute, a broader distinction is made

between an ordinary life insurance company and an assessment company, than between such ordinary company and a fire insurance company.

Sec. 63 of the act, after defining life insurance companies, provides that such organizations "shall not make any such insurance guaranty, contracts, or pledge in this state, or to, or with, any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, and the consideration thereof, nor the performance of which is contingent upon the payment of assessments made upon survivors."

It must surely be conceeded that as the act then stood, no company organized under said Chapter 175 could do the business for which the Bankers Life Association was organized, as shown by its articles of incorporation and by-laws. The amendments to this act as made by the laws of Minnesota 1901, chapter 143, so far as they refer to this branch of the subject are as follows:

> Sec. 21. "The general provisions of law relative to the powers, duties and liabilities of corporations, or their agents, shall apply to all incorporated insurance companies as far as the provisions are pertinent and not in conflict with the provisions of law relative to such companies, or with their charters.
>
> Any insurance company, not excepting companies transacting life, or casualty business on the mortuary assessment and stipulated premium plan, or either thereof, may qualify and be governed by this chapter, anything in its special charter to the contrary notwithstanding; provided, that nothing herein contained *shall impair, or operate to impair the obligations of any contract,* and provided further, that after such qualification, the company qualifying shall be governed solely by this act; and, provided further, that nothing in this act contained shall apply to any town insurance, mortuary assessment, or stipulated pre-

mium company, unless and until it shall accept and qualify under the provisions hereof; and, provided further that notice of the acceptance of said act be filed with the insurance commissioner."

Sec. 63. "All corporations, associations, partnership, or individuals doing business in this state under any charter, compact, agreement, or statute of this, or any other state, except as provided in section three, involving the payment of money, or other things of value to families, or representatives of policy and certificate holders, or members, conditioned upon the continuance or cessation of human life, or involving an insurance guaranty, contract, or pledge for the payment of endowments, or annuities, shall be deemed to be life insurance companies, and shall not make any such insurance guaranty, contract, or pledge in this state, or to, or with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor the performance of which is contingent upon the payment of assessments made upon survivors; provided, that nothing in this section contained shall apply to any contract, policy, or certificate of membership issued by any corporation, or company while transacting the business of life insurance on the mortuary assessment plan and stipulated premium plan, or either thereof, prior to receiving authority to transact life insurance business under the provisions of this act, but such contracts, policies, and certificates shall be fulfilled and carried out according to the terms and conditions of each thereof, subject to change by the parties thereto."

These two sections clearly operate to forbid the making by any company operating under the act, of any future contract, or policy of insurance on the assessment plan.

The legislature of Minnesota, by insisting, in Sec. 21 of the act that any company organized, or re-organized under the act "shall be governed solely by this act," and by leaving Sec. 63 unchanged, carefully stipulated that no more assessment business should be done, except, that the pro-

viso added to Sec. 63, by the amendment of 1901, pretends to provide that such contracts already made should be carried out.

The nature of the assessment insurance contract shows plainly the absurdity of this proviso.

From this law, which is the law on which the defendants rest, it is clear that whether legal reserve insurance is in fact a different business from assessment insurance, it is made so by the law of Minnesota. *It is the law that a company doing one kind of business is forbidden to do the other.* It makes them different and builds what was intended to be an impassable wall between them.

Independent of the statute, it is common knowledge that assessment and the so-called old time insurance, are not the same kind of business. To suggest anything of the kind to any officer, or agent, of a legal reserve company, would call down upon the head of the suggester a storm of indignant and voluble protest.

The two schemes of insurance here considered, are in conflict. In the one, there is an absolute dependence of each member upon every other member. He is obliged to pay in his money not for the benefit of his own policy, but for the benefit of the beneficiaries of such other member in case of his death.

In the other plan, he pays in his money for the support of his own policy. As was said by Judge Dyer in *Smith* v. *Assn.*, 24 Fed., 689, "the ordinary life policy rests on the promise of the company to pay the sum therein named. The policy holder in such a company is under no obligation to pay anything for the benefit of the holder of other policies."

If it can be said that both the Bankers Life Association and the Minnesota Mutual Life Insurance Company are mutual companies, it is a clear and sufficient answer that the mutuality in the first is one of contract and obligation, while in the latter, it exists only as to prospective profits.

The two plans are fundamentally opposed to each other, and are radically different by operation of law.

The Unconstitutionality of the Law of 1895 as Amended by Chapter 143 Laws of Minnesota, 1901.

As before stated the statutes of 1895, was amended by adding to Sec. 21 above quoted, the provision granting permission to any mortuary Assessment Company to reincorporate under this act provided that nothing herein contained shall impair, or operate to impair the obligation of any contract. The procedure for such re-organization was to be as follows:

> "To accomplish such re-incorporation a resolution shall be adopted by a majority vote of all the votes cast by the stockholders of a stock company, or by a two-thirds vote of all the votes cast by the members of any other company, at any special meeting called for that purpose, of the holding of which not less than thirty days written, or printed notice, specifying the time and place, shall have been given, or by such majority vote, or two-thirds' vote, as the case may be, at any regular meeting of such stockholders, or members, authorizing and declaring such reincorporation, and setting forth the future corporate name of such company, which must not so closely resemble the name of an existing corporation authorized to transact business in this state as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact, and on what business plan or principle; the place within this state of its location, or home office; and, if on the stock plan, the amount of its capi-

> tal stock; also, any additional suitable and lawful declarations or matters the said incorporators may see fit to incorporate therein."

Reduced to its simplest terms, it permitted such reincorporation by a two-thirds vote of *all votes cast* at any special meeting called for that purpose, or by a similar vote at any regular meeting of the members.

Section 11, Article 1, of the Constitution of Minnesota, following Section 10 of Article 1 of the Constitution of the United States, provides that,

> "no bill of attainer *ex post facto* law, nor any law impairing the obligation of contracts shall ever be passed."

The court will, no doubt, have noticed that the provisions of the act cited in relation to the reorganization are permissive. They give internal evidence of being the work of an interested party acting through the legislature.

It is claimed by the appellants, that these provisions are not only contrary to the constitutional provisions of the State of Minnesota, and Federal Constitution, but that they are actually vicious. They in terms permit less than a majority of the members of a corporation like the Bankers' Life Association, to do what even a majority could not lawfully do. It ordinarily requires a majority of the membership, or of the stock of a corporation, to constitute a quorum of that corporation at its annual, or special, meetings, where votes of the stockholders, or members, are required to do business.

If, as might well be the case, in a corporation having numerous members, a bare majority of them are represented at the meeting, then by this law, two-thirds of that majority, or a little more than one-third of the membership, might make the contemplated change.

We shall not waste the time of the court by argument, or citation of authorities, to show that a law that would permit such a state of affairs is in violation of contract rights, and is unconstitutional and void.

If it is *not apparent* from the facts stated that this portion of the law of 1901, is vicious to the last degree, no argument can make it so.

It was urged in the court below, that the proviso attached to Sec. 63 obivated the charge that the statute was unconstitutional. If, as Section 63 of the amended statute provides, viz.:

> *"That nothing in this section contained shall apply to any contract, policy, or certificate of membership issued by any corporation or company, while transacting the business of life insurance on the mortuary assessment plan and stipulated premium plan, or either thereof, prior to receiving authority to transact life insurance business under the provisions of this act, but such contracts, policies, and certificates shall be fulfilled and carried out according to the terms and conditions of each thereof, subject to change by the parties thereto,"*

the former members, who bought the "Guaranteed Option Policy," are nevertheless liable for assessments, as provided by the charter of the company when appellants or either of them became members thereof, viz., Article VI:

> *"All assessments upon members of this company shall be apportioned among* ALL *the members thereof pro rata, that is to say, in proportion to the amount that each member has paid into the 'Guaranty Trust Fund.'"*

This contract with the mortuary certificate members cannot be kept without making the assessments on all members of the company, and enforcing the liability; therefore the company cannot keep its obligation to mortuary certificate members, as required by said Section 63 of the amended stat-

nte. Furthermore, the original statute, as above quoted, prohibits legal reserve companies from issuing any insurance contract the performance of which is contingent upon assessments made upon survivors, thus, in effect, declaring it to be the law of Minnesota that assessment companies cannot change from assessment companies to "legal reserve" companies without first dissolving the assessment companies.

The Fraudulent Character of the Reorganization of August 5, 1901.

Chapter 143, Laws of Minnesota for 1901, so far as it relates to re-incorporation, was permissive only. It was approved April 6, 1901.

Sec. 2 reads as follows:

> "This act shall take effect and be in force from and after the 1st day of July, 1901."

On the 5th day of July, 1901, the notice of the annual meeting of the Bankers Life Association of Minnesota was sent out, and on August 5th the meeting was held.

The by-laws adopted by the board of trustees in 1898, (Ex. D. of answer, Rec., 575; Pr. Rec., 314), in regard to meetings of the Association, read as follows:

> Article I. Annual Meeting—Special Meetings.
>
> Sec. 3. *Basis of Voting—Proxies.*—At any meeting of members, regular, or special, each member in good standing shall be entitled to one vote for each $1,000 of Insurance on his life, and a fractional vote at the same rate on fractional parts of $1,000 of such insurance. Any vote may be cast at any meeting for any purpose, either in person or by proxy duly appointed in writing. The proxy may be appointed in and by any application for any insurance or membership, or by any other proper writing signed by the mem-

ber. Voting by proxy shall be subject to the following rules:

(1) The proxy must be registered with the Secretary at least five days before the meeting at which it is offered.

(2) No individual not a member shall be appointed as the proxy of any member.

(3) Proxies shall remain operative until revoked by a notice in writing signed by the member and filed with the Secretary.

Insurance to the amount of $250,000 represented either in person or by proxy, or partly in person and partly by proxy, shall constitute a quorum of all annual and all special meetings of members."

It will be observed that the notice for this annual meeting contained no reference to any intended change of the company, but was an ordinary notice that any such Association would send out in the ordinary course of its business. (Rec., 806; Pr. Rec., 438.)

While it may be true that such an Association can at its regular annual meeting transact any business that could lawfully come before it, it could not be considered fair play on the part of the board of trustees, to take a step of such importance as was taken, without giving the members some chance to have a voice in the proceedings. The record of the meeting (Rec., 669-678; Pr. Rec., 362, 366) shows that it is a euphemism to call it a meeting of the members. Out of a little more than $15,000,000 of so-called insurance in force at that time, $9,265,000 was represented in person, or by proxy. The board of trustees had, and voted proxies representing $8,910,000 and Douglas Putnum, the secretary of the company, had and voted proxies to the amount of $147,000; Mr. Bigelow, the treasurer of the company had some more proxies, so that $156,000 only of insurance was represented in person, and quite a number of

these persons were connected with the management of the Association.

On the final vote on the adoption of the resolution of reorganization, persons representing $52,000 of the amount at first present at the meeting did not vote at all, so that of the total insurance in force, only about $100,000 was represented in person upon that vote.

It must be observed here that some of the members of this Board of Trustees were not members of the Association, and never had been (Rec., 240-242; Pr. Rec., 135-136) and that by the by-laws above quoted, and by the terms of the notice of the meeting, "no individual not a member shall be appointed as the proxy of any member."

There is some doubt in our minds whether under the rules, the non-membership of some of these trustees would not debar the board from voting these proxies, but there is no doubt of the impropriety of the Board of Trustees, as an entity, voting at a meting of the members of the Association.

We have found no authority on this point, but this case appears to offer a good opportunity for making one.

The defendants claim that nothing was done at the meeting that the actors therein had not the legal right to do. This cannot be true. The trustees were bound to use the greatest good faith in dealing with the affairs of the Association. They were the paid agents of the members. Can any one read the amendatory act, the notice for the meeting, the report of that meeting, and observe the speed with which the resolution of reorganization was accepted, and filed, as required by the statute, without being convinced that the defendant trustees had long before its consummation, concocted the plan for such reorganization; and fearing opposition, had so arranged matters, that the object of this

meeting should be concealed from the members, so that it might be in the control of the trustees themselves, and their friends; and had so arranged matters, that if any opposition to their plans should develop, the opponents would have to act very quickly to prevent the proposed corporation from becoming *de facto,* at least.

To re-state our contention, the reorganization of August 5, 1901, was and is void, because it violates the contract between the members of the Bankers Life Association of Minnesota, because it proposes to, and does abandon the business for which that Association was organized, because the law permitting such reorganization is, so far as it undertakes to permit such reorganization, contrary to the Constitution of the United States and of the State of Minnesota, and because even if the act is valid, there was not a compliance either in the letter, or spirit with the terms of the act.

The Violation of the Contract by the Issuing of the "Guaranteed Option Policy."

It has been seen that the adoption of the scheme for the issuance of this "Guaranteed Option Policy" was not the work of the Association, but of the trustees. (Ex. D, Deft.'s Answer, Rec., 564-9; Pr. Rec., 308-11.) The plan upon which the "Guaranteed Option Policy" was issued, is set forth on pages 217-224 of the record. (Pr. Rec., 119-123.) A copy of one of such policies, admitted to be in substance the form of policy so issued (paragraph 12, Deft.'s Answer), is set forth in Exhibit C of the bill of complaint. (Rec., 57; Pr. Rec., 31.)

By the terms of this policy the Association, in consideration of specific payments, agrees to pay ———— thousand dollars upon the death of the insured, subject to the "*advan-*

tages, privileges and *provisions* contained in the following pages."

The second clause in these special advantages was this, that "no personal liability to make any involuntary cash payment whatever is incurred by holding a policy in this company. Any member is free at any time to cancel any past, present, or future indebtedness to this company by surrendering this policy at the home office for cancellation."

Bearing in mind that the whole theory of assessment insurance rests upon the personal liability of the member to pay assessments, a person holding this policy was certainly not on the same footing as the one holding a mortuary assessment certificate. If it were possible to levy an assessment on him, there was nothing to bind him to pay it. But it is clear that no assessment could be made, since the only provision in the policy that is claimed to make this an assessment policy is the one that provides for the creation of a deficiency in the policy in case unexpected losses and expenses should reduce the amount of the reserve to the credit of the policy, to less than the computed required reserve. It is in evidence that no assessment was ever levied upon any holder of these so-called policies, notwithstanding that many deaths did occur between December 31, 1898, and July 31, 1901. (Rec., 319; Pr. Rec., 183.)

The contract of the mortuary assessment members provided (Defts. Ex. C, Sec. 6, Rec., 552; Pr. Rec., 302):

> "All assessments upon members of this corporation shall be apportioned among ALL the members thereof *pro rata*. That is to say, in proportion to the amount that *each member* has paid into the 'Guaranty Trust Fund.'"

It is admitted that after the issuance of these "Guaranteed Option Policies," no attempt was made to secure members on the mortuary assessment plan, and that the officers and trustees of the Association have solicited members already holding mortuary assessment certificates to exchange them for "Guaranteed Option Policies," and that about one-half of the certificate holders did, upon such solicitation, so exchange their certificates. That this exchange upon such a plan was a breach of the contract between the members, caused by the unlawful acts of the trustees, seems plain. The member exchanging intended to cut himself off from his assessment obligations. He was promised that no assessments should be made against him. His policy might be somewhat reduced under certain circumstances, but no cash payments could be exacted from him. The remaining mortuary assessment members were deprived of his support as effectually as if he had left the Association, and taken insurance in another company. If the trustees had endeavored to get new members on the co-operative assessment plan, it might have been less objectionable, but they proceeded to do their Association a double wrong in urging "the new plan," as they called it. Instead of taking in new members, as they were in duty bound, they encouraged desertion of the members already secured. They did even worse than this.

The Association, in pursuance of its legitimate business, had up to January 1, 1899, accumulated assets to the amount of about $900,000. The deposits of the members in pledge, known as the "Guaranty Trust Fund," had always been kept invested in government bonds, bearing interest as provided for by article X of defendant's Exhibit C. (Rec., 555; Pr. Rec., 304.)

The expense assessments, and the interest on these bonds, were capable of use to meet the expenses of management. The amount of these assessments and interest were, for the most of the years, more than sufficient to meet such expenses, and in 1887 a fund was created called the "contingent fund," which, as the secretary of the company says, was created "to receive interest." (Rec., 208; Pr. Rec., 114.) The surplus over the expense of management was at irregular intervals transferred to this fund, and while some interest was derived from other sources than the bonds in the "Guaranty Trust Fund," the testimony is clear enough that the amount in that "contingent fund" did not vary very much from the interest realized upon those bonds. (Rec., 208-210, 193-199; Pr. Rec., 114, 115, 104-108.)

It may be considered elementary law that where funds are contributed by different persons for a special object, they should be used for that object, so that the assessment of the members for expense of management should be the first funds devoted to that purpose.

It will scarcely be contended that the provision of Article X: "All interest realized from such bonds shall meanwhile be used to defray the company's operating expenses," is mandatory, or that "meanwhile" means forever.

The expense assessment being sufficient for expenses, the interest from a fund pledged to pay death losses in an Association whose primary object was the payment of such losses, not being required for this secondary purpose, should have been returned to the fund in order to carry out the primary purpose of the Association. During the years when the Association was honestly managed, some of it was so returned. The government bonds in which the fund was invested, at maturity, of course, were worth less than when purchased. Ac-

cordingly when such bonds did mature and were paid off, thereby making a loss to the "Guaranty Trust Fund," that loss was made good from the "contingent fund." (Rec., 215; Pr. Rec., 119.) This was right and proper. But when the trustees began to issue the "Guaranteed Option Policies," it was deemed necessary to offer some inducement to the members for making a change in their policies. In addition to freedom from assessments, they were offered a credit upon the fixed premium to be paid by them, on the Guaranteed Option Policies, of an amount equal to their pledges, deposited to secure payment of assessments against them, with interest. (Rec., 218; Pr. Rec., 120.)

The method of computing this interest was very curious. A member who had belonged to the Association for ten years, or less, was allowed his pledge and 10 per cent. thereof added for each year of his membership. If his membership had continued for more than ten years, he received in addition to the 10 per cent. interest for the first ten years, 5 per cent. interest for each additional year, which altogether was a much higher rate than could have been realized on the government bonds in which his pledge had been invested.

In passing, it may be noticed, that this inducement for making a change, was not so strong in the case of an older member, and perhaps the trustees did not want him so badly for the new plan.

It was necessary to provide for this credit, so that it was arranged that the amount thereof should be charged to the "contingent fund" and transferred in one way or another, to the "premium fund," where it should stand to the credit of the member. All this "premium fund" was made up from the contributions of members holding "Guaranteed Option Policies" or legal reserve policies. (Rec., 221-2-3; Pr. Rec., 122, 123.)

During the years 1899, 1900 and 1901, $236,100.78 were so transferred. (Rec., 223; Pr. Rec., 123.)

Appellants claim that since the "contingent fund" was largely, if not entirely, made up of interest on the "Guaranty Trust Fund," that had not been, or should not be, used for expenses of management except in case of absolute necessity, such transfers, in effect, took money from the "Guaranty Trust Fund" for purposes other than death losses, and that such use violated Article X of the contract made by them.

A trust fund, the interest of which absolutely belongs to someone else, is of little value to the *cestuis que trustent*, and no such theory as that of these trustees can be correct.

The solicitation of members to exchange their policies, and the transfer of funds as above stated, under the plan, was carried on continuously by the defendant trustees up to the time of bringing this action, and members numbering about 3,800 and holding about 5,500 certificates of membership (Rec., 232, 238; Pr. Rec., 129, 133-4), had changed their certificates for "Guaranteed Option Policies" and had received the credits allowed them, thereby making themselves parties to the breach of the contract. Other members, holding certificates to the amount of about $10,000,000 had failed or refused to pay further assessments of any kind, and were dropped from the rolls of the Association. So that members had been lost, more had been taken away, and no attempt had been made to add new members, the funds of the Association had been diverted from their original purpose, and Article X of the articles of the Association, had not only been amended, but practically abrogated by the so-called amendments of the articles of Association of December 31, 1898, which, by amending all the other original articles, left that one no base upon which to stand, and the insurance in

force had, by December 31, 1901, dwindled from $24,180,000 to $14,160,629.20 (Rec., 238; Pr. Rec., 134), including all the so-called "Guaranteed Option Policy" insurance.

The defendants, in the court below, claimed that this was still a "going concern," which may be conceded without conceding the invalidity of any of our objections to its continuing its course.

The power to amend the articles of incorporation, as was done, is claimed by the trustees under the provision in Article 14 of Defendants' Exhibit C, "to amend these articles (except as therein otherwise provided)." It must be conceded that this is a grant of broad powers, but to amend does not mean to abrogate, or destroy. Under such a power the trustees could no more pass a by-law impairing a contract made by the members than could the legislature. Their power to amend was confined to the scope and objects of the Association as originally organized. This is too self-evident to call for argument.

We think that there can be no doubt that the contract of appellants with the other members of the Bankers' Life Association, has been violated, and that the business for which that Association was organized has been abandoned, and that both of these wrongs are the result of unlawful acts of the defendant trustees and those other members of the Association who have joined with them in carrying out their unlawful plan and purposes.

The Defense.

The defense to the action may fairly be divided into five heads.

1st. The acts complained of, were lawful and not in violation of the contract.

2nd. The acts done were prompted by honest motives, the plan adopted was for the benefit of the members, and was called for by the necessities of the business, and that the insurance upon the new plan was better than that furnished by the old.

3rd. Laches on the part of appellants.

4th. That the appellant, Wright, has no standing in court, because he refused to pay assessments, and appellant, Trubey, similarly has no standing, because he did pay his assessments.

5th. The time-honored, but rather unsatisfactory defense, of "you're another."

The first defense is one upon the merits and has received careful attention.

The second of these defenses is immaterial, the question of the profitableness or unprofitableness of the contract was not for the trustees to determine. Their business was to carry out the contract as made by the principals, for whom they were only the agents. Their duties were not paternal but administrative. When the principals in the contract should determine that a change would be advisable, and should all consent to the change, then such a change could be made. The authorities cited above are in unison on this point, and among the multitude of cases in which it has arisen but one even apparent exception can be found, the case of *Supreme Lodge of K. of P's* v. *Knight,* cited by the defendants in the court below, an Indiana case reported in 20 N. E. Rep., 749. It, however, requires only a casual inspection of that case to see that it does not dispute the general principles stated, but bases the decision on the particular form of contract there considered.

The contract in the case at bar, might not have been the

wisest one that could have been made, but it is one in which the total cost of insurance, including expense of management, in the eighteen years of its continuance, did not much exceed the ordinary expense of management alone, in many of the so-called legal reserve insurance companies. (Rec., 717; Pr. Rec., 389.) In this respect, at least, no change seems desirable.

Further, it is a matter of opinion merely, as to whether the state of insurance business in the country at large, during the years in which the changes we complain of were carried out, called for any change.

The testimony of Mr. Temple, the president of the Bankers' Life Association, of Des Moines Iowa (Rec., 482-497; Pr. Rec., 266-272), shows that an Association built on the same lines as the Bankers' Life Association of Minnesota, and organized but a short time before the latter Association, went through all these years not only without loss of business, but with a very substantial increase in membership, and in assets for every one of those years, and with a membership covering a large portion of the United States, could not discover any necessity for any change either in the plan of operation, or in the character of the business itself.

Up to December 31, 1898, the Bankers' Life Association of Minnesota, had gone through nearly five years, following the panic of '93, of the most trying times in the country, for insurance business, and especially for its class of business, without substantial loss of membership (Rec., 704; Pr. Rec., 382), and for every year had made a substantial increase in its assets. (Rec., 384; Pr. Rec., 217.) Insurance had been paid when deaths had occurred, the cost to the remaining members was very low, and they were in the main satisfied with the conduct of the affairs of the com-

pany. They did not secure an investment, but they had secured temporary protection, and had saved money at a time when such saving frequently represented the narrow margin between solvency and bankruptcy.

There was considerable testimony introduced by the defendants, notably that of Mr. Wollf and Mr. Dearth, the insurance commissioner of the State of Minnesota, to show a falling off in assessment insurance caused by distrust in the plan of assessment insurance. This evidence seemed to complainants to be very immaterial, and the evidence of Mr. Dearth shows that while many so-called assessment companies, went out of business, and there was a loss of assessment insurance pure and simple in the years of 1898 to 1901, nevertheless, the assessment insurance proper, as included in both assessment and fraternal associations, had actually increased both in amount and in proportion to other classes of insurance during all those years (Rec., 837; Pr. Rec., 457), so that the distrust must have been, not of the plan of assessment insurance, but of the agents appointed to carry it out.

We should not have thought this portion of the defense entitled to consideration, if the court below had not devoted considerable attention to it. Its only merit rests upon the maxim that necessity knows no law.

The defense of laches is disposed of by the undisputed facts that the prompt action of the trustees following the meeting of August 5, 1901, precluded the obtaining of an injunction against the proposed reorganization before the scheme was carried into effect; and that this action was begun on October 10th, or barely sixty days after the wrong had been accomplished. There was as to this branch of the cause, no laches on the part of complainants.

The issuance of the "Guaranteed Option policies" as has been shown, was continued up to the date of bringing the action. The issuance of the latest one of those policies, was as much an injury to be complained of, as was the issuance of the first. The wrong was continuing and cumulative. Besides the members who accepted the exchange of certificates of membership in the Bankers Life Association for these "Guaranteed Option Policies," were partners in the wrong. As to those, no laches possibly could exist.

When the Bankers Life Association of Minnesota, ceased to levy assessments on *all of its members pro rata,* there was a clear violation of the contracts and rights of complainants, and the fundamental principle of the organization; and assessments thereafter made were not made in conformity with the laws of the association, and no member was obliged to pay them. (Bacon on Benefit Soc., Vol. 2, page 739, and cases cited.) And this is true even if the new method of assessment was more equitable than the old. (Niblack Benefit Soc., 2nd Ed., page 474.)

An association of this kind cannot declare a forfeiture of membership for failure to pay assessments unlawfully levied.

There should, perhaps, in this case, have been an assignment of error on the ruling of the court below that appellant Wright had no standing in this case, but that ruling is error, only if the trustees had not the right to continue to levy assessments after the change of plan and the acts done as the result of the issuance of the "Guaranteed Option Policies." If those acts were wrong, and not within the authority of the officers and trustees of the Association, the error of the court below is plain, and we hope will be so considered by the court.

Of course the demand of Wright that his money be returned, not having been complied with and nothing having been done in regard to it, it is simply absurd to deny him the privilege of changing his mind at any time before something prejudicial to the rights of others had resulted from his demand.

The defense raised on the alleged acts of appellant Trubey received no consideration in the court below, and is entitled to no considereration here.

The last defense was in no manner set up, or even suggested, in the pleadings, and would not be mentioned here but for the unnecessary remarks with which the court below concluded his opinion, and the fact that nearly one-third of the total cost of this action was made by the defendants in attemtping to show that one E. D. Carter was a bad man, and had instigated Wright and Trubey, and others, to bring this action. Even if the pleadings had set up this defense, we fail to see that it is in point. Prior to disbarment, the worst shyster lawyer in the country may bring a client into court and have his case heard on its merits. It is the case that should be heard, and not the story of the previous *alleged* villanies of the lawyer. A convict just out of the penitentiary may, solely for revenge, tell a respectable citizen where and how he can right a wrong done him, and urge the matter upon the citizen, but that fact has nothing to do with the determination of the case. We think that the defendants had no right to introduce this mass of testimony, and that the court was stepping down a long way in considering it, and a little further in his language concerning it.

The right of Trubey, at least, to bring the action, was

not questioned, and the case had already been decided upon the only points that the court, under the pleadings, was entitled to consider.

THE RELIEF.

It appears by the evidence, and the law, that the Bankers' Life Association of Minnesota has, by the wrongful action of its trustees, aided by a large number of its former members, abandoned its business, and that an illegal organization composed of those trustees, and some of those former members, has usurped the functions of the original Association and is holding its funds and diverting them from their proper contemplated use. The wrongful acts have reached such a stage, that an injunction against their continuance is not an adequate remedy. So much of the business of the original Association has been lost and diverted, that it would be impossible to restore it to its former condition, so that the only remedy that remains to the complainants and those they represent is, that a receiver shall be appointed to wind up the affairs of the Association and distribute its assets to those entitled thereto. The Association, being legally dead, should be legally buried.

We think this action is demanded not only by the law and the facts, but by every consideration of sound public policy. The undisputed facts in this case would have been held to authorize the dissolution of any partnership formed for the purpose for which the Association was formed, and we think there is abundant reason that more strictness should be required in relation to the faithful carrying out of contracts between the members of an Association like this,

than in the case of a partnership. The members of such an Association are usually widely scattered, and are at a great disadvantage in the matter of protecting their interests. Those interests are usually small, and it is common knowledge that if one, or two, bring an action against a corporation for their protection, that the claim will be raised that they are only "disgruntled members," and represent an insignificant minority not entitled to consideration. If a larger number combine, conspiracy is charged. The management of the Association, armed with proxies and protected by the money of the Association, is in a position to, and usually does, make the contest so expensive as to deter any but the most persistent and courageous from entering such a contest. Most members believing themselves wronged, sacrifice their interests and leave the field, feeling that the maxim, *ubi jus, ibi remedium,* is of little value, if the remedy is put beyond their reach. It would seem that the restrictions on the right of a corporation to violate a contract with its members should not be relaxed, and that the officers and trustees of such Association as the one at bar should be held to the strictest accountability in carrying out the plans and purposes of the Association.

The judgment of the court below is not justified by the facts, is contrary to the law, and we think is thoroughly vicious in principle and should be reversed.

Respectfully submitted,

DILLON & GOETZ,
Solicitors for Appellants.

JOHN F. BYERS,
Of Counsel.

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JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 178.

SAMUEL WRIGHT ET AL., *Appellants*,

vs.

THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY ET AL.

APPENDIX TO BRIEF OF APPELLANTS.

STATUTES OF MINNESOTA.

CHAPTER 76.

ACTIONS RESPECTING CORPORATIONS.

SEC. 5889. This chapter embraces all corporations, including in such designation all associations having any corporate rights, whether created by special acts or under general laws.

(G. S. 1866, c. 76, sec. 1; G. S. 1878, c. 76, sec. 1.)

SEC. 5892. Actions may be commenced against corporations, whether created under the laws of this State, or any other State or country, except as otherwise expressly provided, in the same manner as other civil actions; and where

service of summons is made according to the statute, the plaintiff may proceed thereupon in the same manner as in civil actions against natural persons.

(G. S. 1866, c. 76, sec. 4; G. S. 1878, c. 76, sec. 4.)

SEC. 5900. Wherever any corporation having banking powers, or the power to make loans on pledges or deposits, or authorized by law to make insurances, becomes insolvent, or unable to pay its debts, or neglects or refuses to pay its notes or evidences of debt on demand, or violates any of the provisions of its act or acts of incorporation, or of any other law binding on such corporation, the district court may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges and franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering, to any person, any of the moneys, property or effects of such corporation, until such court shall otherwise order.

(G. S. 1866, c. 76, sec. 12; G. S. 1878, c. 76, sec. 12.)

(A corporation organized under Laws 1885, c. 184, engaged in the business of life or endowment or casualty insurance on the co-operative or assessment plan may be proceeded against under this section. State *v.* Educational Endowment Ass'n of Minneapolis, 49 Minn., 158; 51 N. W. Rep., 908.)

SEC. 5901. Such injunction may be issued on the complaint of the attorney general, in behalf of the State, or on the complaint of any creditor or stockholder of such corporation. Whenever such injunction issues against any bank for any violation of its charter, on the complaint of any creditor, the court shall proceed to final judgment in such case, and adjudge a forfeiture, if the proof is sufficient, notwithstanding such creditor may settle with such corporation, and relinquish his claim against said corporation; and

in all such cases, the attorney general, or any creditor, shall have the right to appear and prosecute such action; and such action shall not be discontinued, if either of them so appear and prosecute the same.

(G. S. 1866, c. 76, sec. 13; G. S. 1878, c. 76, sec. 13.)

SEC. 5902. The court, in any stage of the proceedings, may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for and recover the debts and demands that are due, and the property that belongs to such corporation, who shall in all respects be subject to the control of the court.

(G. S. 1866, c. 76, sec. 14; G. S. 1878, c. 76, sec. 14.)

LAWS OF MINNESOTA FOR 1885.

CHAPTER 184.

SEC. 6. Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with, its members whereby upon the sickness or other physical disability of a member, or by reason of having attained a certain age, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to such member or beneficiary designated by him, which money, benefit, charity, relief or aid are derived from voluntary donations or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof, or members of a class therein, and interest and accretions thereon; and wherein the paying, rendering or providing of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity relief or aid is applied to the uses and purposes of such corporations, association or society, and the expenses of the

management and prosecution of its business, shall be deemed to be engaged in the business of casualty insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this act.

SEC. 15. * * * All associations, societies, companies, corporations or organizations now transacting, or hereafter desiring to transact the business of life, endowment or casualty insurance in this State, upon any other plan than that defined in and by sections five (5) and six (6) of this act, shall comply with all the provisions of the general life and health insurance laws.